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No. 79-1786

IN THE
Supreme Court of the United States
TERM, 1980

EARL DAVID SHAFFER,

Petitioner-Appellant,

vs.

JAY R. BOND,

Respondent-Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June, 1980.

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STATEMENT OF THE CASE

Petitioner is petitioning this Court for review of the disposition of his cause of action against respondent by the Oklahoma Courts. On March 15, 1978, Judge Harold C. Theus, District Judge of the District Court of Oklahoma Country, Oklahoma, sustained respondent's Motion for Summary Judgment and entered judgment in favor of the respondent and against the petitioner. The Court of Appeals of the State of Oklahoma (Division No. 1) affirmed the District Court's judgment by Order dated October 30, 1979. On December 18, 1979, petitioner's Petition for Rehearing was denied by the Court of Appeals. Subsequently on February 11, 1980, petitioner's Petition

for Writ of Certiorari was denied by the Supreme Court of the State of Oklahoma. Petitioner has now filed his Petition with this Court.

STATEMENT OF FACTS

This litigation is an outgrowth of a series of legal actions in numerous courts and jurisdictions relating to the divorce and child custody problems between the petitioner and his former wife, Mrs. Sue Ellen May. Respondent herein is an attorney who represented Mrs. May during a portion of this prior litigation against the petitioner. The issues involved in that litigation were ultimately determined by the Oklahoma Supreme Court in an order dated June 16, 1975, and appended to petitioner's Petition herein as Exhibit "C". That Order resolved the custody issue in favor of Mrs. May based on a finding that the lower Court which had granted temporary custody to petitioner Shaffer was without jurisdiction to act. Said Order of the Oklahoma Supreme Court was never appealed and subsequently became final and the issues therein res judicata.

Subsequently, on October 26, 1976, petitioner initiated this present action in Oklahoma County District Court alleging legal malpractice and conspiracy on the part of the respondent. The basis of petitioner's allegation was that certain legal advice which respondent allegedly gave to his client, Mrs. May, during the pendency of the prior custody suit was in violation of a duty which respondent owed to petitioner under the District Court's order granting temporary custody to petitioner. Since said order had been held null and void by the Oklahoma Supreme Court over two years prior to the filing of this action, the Oklahoma District Court granted summary judgment and the Court of Appeals affirmed, ruling that under Oklahoma law no rights can arise under a void order. (See

Exhibit "D" to Petition for Writ of Certiorari).

ARGUMENT AND AUTHORITIES

Petitioner continues in his Petition for Writ of Certiorari, as he has done throughout this litigation, to assert and attempt to relitigate the issues involved in the prior custody action. Respondent would call the Court's attention to those issues set out as questions for review by this Court in petitioner's Petition for Writ of Certiorari, specifically Nos. 1, 2, 3 and 11 (pp. 2 and 3 of Petition), all of which questions have been previously determined by the Oklahoma Supreme Court in the order which was not appealed and said issues have become res judicata and do not provide a proper basis for review by this Court.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257. Apparently, the constitutional issue which petitioner relies upon is an alleged violation of his constitutional right to due process under the Fourteenth Amendment. However, none of the eleven issues presented in the Petition for Writ of Certiorari involve due process under the United States Constitution or in any way constitue a substantial federal question. Although petitioner attempts to couch these issues in terms of equal protection and due process, he wholly fails to state a constitutional basis for review by this Court as required by 28 U.S.C. § 1257 and the cases construing this section.

Rather, the eleven questions for review set out in the Petition for Writ of Certiorari make it clear that petitioner is simply objecting to the fact that the Oklahoma Courts in interpreting and applying the Oklahoma law arrived at what petitioner considers incorrect conclusions which resulted in the granting and affirming of summary judgment in favor of the respondent and against the petitioner. Petitioner states that the Oklahoma Courts have "completely disregarded the law" and that the

Oklahoma Courts have subjected him to "gross injustice" (Petition, p.7). Petitioner thus concludes that he is entitled to have his Petition granted, and these alleged injustices and errors reviewed by this Court.

However, in guaranteeing due process, the Fourteenth Amendment does not guarantee immunity from judicial error. *Stein v. New York*, 346 U.S. 165, 97 L.Ed. 1522, 73 S.Ct. 1077. This rule that an erroneous decision does not necessarily deny due process has been applied specifically to errors of a State Court in interpreting and applying the laws of that state. See *Howard v. Kentucky*, 200 U.S. 164, 50 L.Ed. 421, 26 S.Ct. 189. Therefore, even if the Oklahoma Courts erred in their rulings as alleged by petitioner, such alleged errors of law do not provide a basis for the Court to review those decisions.

Furthermore, the mere fact that petitioner has been unsuccessful in the Oklahoma Courts does not indicate that there has been a violation of the due process of law guarantee. *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 82 L.E. 268, 58 S.Ct. 185. If there has been a full hearing or opportunity for hearing, there is no necessary violation of the guarantee. *Goltra v. Weeks*, 271 U.S. 536, 70 L.Ed. 1074, 46 S.Ct. 613. Petitioner was given every opportunity for hearing provided for by Oklahoma law and Court Rules, and his allegations to the contrary are the result of his misunderstanding of his rights and the legal processes which protect those rights.

Petitioner alleges that he was denied the right to a fair trial and due process because of a biased judiciary. Although he does not so specifically state in his Petition, on prior appeals petitioner has cited failure of the District Court Judge to disqualify himself upon petitioner's request as the basis for this allegation. However, the procedure for disqualification of a judge is set out clearly in Rule 15 of the Rules for District Courts of Oklahoma, 12 O.S. Ch. 2 App.

This rule states that a party aggrieved by the refusal of a judge to grant a motion to disqualify may represent his motion to the chief judge following a written request for rehearing within ten (10) days from the date of the adverse order. Copies of such request are to be mailed to the chief judge, the adverse party and the judge who entered the original order. If the hearing before the chief judge results in an adverse order to the movant, the movant has ten (10) days in which to file a writ of mandamus in the Supreme Court. The Rule further states that unless these procedures are complied with, the Supreme Court will not entertain such an original proceeding to disqualify a judge.

Petitioner has appended to his Petition no order of the Supreme Court of Oklahoma regarding his Motion to Disqualify. This is because the petitioner failed to follow this required procedure to effect the disqualification of the judge and the issue was never properly before the Oklahoma Supreme Court and cannot therefore be properly raised before this Court. Furthermore, this issue raises no federal question so as to provide a basis for review by this Court.

Petitioner has also claimed that he was denied his right to a jury trial because the trial court sustained respondent's Motion for Summary Judgment. However, it is well recognized that a party is entitled to have a jury trial only where there are controverted facts to be determined by the jury, and where there is no substantial controversy as to any material facts, and any party is entitled to judgment as a matter of law, the Court should render such judgment. Rule 13 of the Rules for District Courts of Oklahoma, 12 O.S. Ch. 2 App. This Rule is also recognized by Rule 56 of the Federal Rules of Civil Procedure.

Petitioner additionally alleges that he was denied his right to a court reporter as set out at 20 O.S. § 106.4 (b). The Oklahoma Supreme Court has previously construed this

statute in *Weeks v. Wedgewood Village, Inc.*, 554 P.2d 780 (Okl. 1976) holding that the failure of a court reporter to transcribe the alleged proceedings at a hearing on defendant's Motion for Summary Judgment does not result in a denial of due process where there were no proceedings held, except appearances and no evidence was taken. Petitioner has previously admitted in his brief in the Oklahoma Supreme Court that there were in effect no proceedings held at the time of his request for a court reporter, except the appearances of the parties and that no argument was heard or evidence presented so as to entitle the petitioner to a court reporter (Brief in Chief of appellant, at p.2). Therefore, under the construction of the Oklahoma Statues by the Oklahoma Supreme Court, no denial of due process was effected by failure of the Court to provide a court reporter. Furthermore, such an issue does not constitute a federal question so as to grant this Court jurisdiction since it involves the construction of a state statute by the highest court of the state.

CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied this Court for the reason that the record as set out in the Petition fails to show affirmatively that any real or substantial federal questions were involved in the decision of the State Courts and for the further reason that a number of the issues set out in the Petition are res judicata.

Respectfully submitted,

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This is to certify that on this 23rd day of June, 1980, a true and correct copy of the above and foregoing was mailed to Earl David Shaffer, 709 Northwest 89th Street, Oklahoma City, Oklahoma 73114, Petitioner Pro Se.

Earl D Mills